

ORAL ARGUMENT NOT YET SCHEDULED
BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

11-3045

UNITED STATES OF AMERICA,

Appellee,

v.

MORRIS B. FAHNBULLEH,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Barbara E. Kittay, Esquire
Counsel for Appellant
(Appointed by the Court)
D.C. Bar Number 414216

P.O. Box 2458
Kensington, Maryland 20891
(301) 468-1817
bkittay@verizon.net

Crim. No. 09-CR-359 (RBW)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a), appellant, Morris B. Fahnbulleh, hereby states as follows:

A. Parties and Amici: The parties to this appeal are appellant, Morris B. Fahnbulleh, a consolidated co-defendant, Joe O. Bondo (Case Number 11-3029), and appellee, the United States of America. There are no intervenors or *amici*.

B. Rulings Under Review: This appeal arises from a final judgment of criminal conviction, following jury trial in the United States District Court for the District of Columbia, of violations of 18 U.S.C. §§ 371, 1349, 1341, 1343, 287, and 2. Appellant argues that the trial court violated the Speedy Trial Act; that it adjudicated the case with jurisdiction or venue; admitted documentary evidence without foundation; sent the case to the jury without sufficient evidence, and misapplied the U.S. Sentencing Guidelines. Appellant filed a timely notice of appeal on May 10, 2011.

C. Related Cases: This matter is on appeal for the first time before this Court. The only related case is the consolidated co-defendant, *United States v. Joe O. Bondo*, Case Number 11-3029.

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GLOSSARY

CRRP	Community Infrastructure Rehabilitation Project
CRS	Catholic Relief Services
CTS	Commodities Tracking System
STA	Speedy Trial Act
USAID	U.S. Agency for International Development
WV-Int'l	World Vision International
WV-USA	World Vision USA
WV-Liberia	World Vision Liberia

ISSUES PRESENTED

In the opinion of the appellant, the following issues are presented by this appeal:

I. Whether the defendant was denied a speedy trial when his transfer from the place of arrest was delayed, where he was held in custody for 155 days before an indictment was returned, where the government did not put forward any reason why it could not proceed with an indictment with evidence it already had obtained from foreign authorities; where the government did not demonstrate that exclusion of this time from the calculation specified in the Speedy Trial Act would be "in the interest of justice [or] outweighs the best interests of the defendant and the public in a speedy trial;" where the original magistrate judge lacked authority to extend the time; and where the second magistrate judge dismissed the charges prior to indictment.

II. Whether the trial court lacked subject matter jurisdiction and venue where the defendant's company had no privity with the United States; where the events took place exclusively in a foreign country; where the dispute was between two non-governmental entities; where the activities of the company that employed appellant involved the contributions of charitable organizations all over the

world; and where layered financial transactions of funds that ultimately were intended to send U.S. foreign aid to Liberia rendered the funds no longer U.S. property and had, at a minimum, changed and concealed the character of the funds such that no reasonable person could have any longer considered them U.S. property, and where, at worst, appellant and others would have believed that the food and commodities they disbursed were donated by Catholic Relief Services.

III. Whether the trial court properly admitted documents the government proffered as business records, where no witness properly authenticated the documents or provided any evidence of who created them (much less whether they had any duty to be truthful or accurate), of where or how they were stored, of the circumstances and manner of their retrieval, or whether the search for records was reliably thorough and complete, or in any respect ensured that the content of the documents was reliable.

IV. Whether the evidence of conspiracy or fraud was sufficient, where the commodities the defendant managed were not property of the United States, the defendant could not have believed they were any longer the property of the United States or that the U.S. mails or wire communications

would be used in connection with his activities, and where the jury did not find that any food, building supplies, or funds had been diverted by or for the benefit of the defendants.

V. Whether the trial court erred at sentencing, in applying a 16-level enhancement for "loss" under U.S.S.G. §2B1.1(b)(1)(I), where the defendant did not concede this amount and where the jury did not find that the defendant diverted funds or resources, and where the total amount of this specific U.S. foreign aid program to Liberia, which transferred through no less than three non-government independent organizations, all of which accepted overhead and commission, was a gross overstatement of loss alleged to be caused by the defendant's activities.

VI. Whether the trial court erred at sentencing in applying a 6-level enhancement because the offense "involved 250 or more victims," under U.S.S.G. §2B1.1(b)(2)(C), where the defendant did not concede these facts, the government did not prove these facts, and the evidence supporting the enhancement was unreliable.

VII. Whether the trial court erred at sentencing in applying a 4-level adjustment for "organizer or leader" based on appellant's position with his company, but not on any proven "role in the offense."

STATUTES AND REGULATIONS

Pursuant to D.C. Circuit Rule 28(a)(5), appellant notes that the following statutes and regulations are pertinent to this appeal:

Criminal Offenses:

18 U.S.C. § 287

18 U.S.C. § 371

18 U.S.C. § 1341

18 U.S.C. § 1343

18 U.S.C. § 1349

The Speedy Trial Act

18 U.S.C. § 3161-3174

18 U.S.C. § 3161(b)

18 U.S.C. § 3161(h)(1)(F)

18 U.S.C. § 3161(h)(7)(A)

18 U.S.C. § 3161(h)(8)

18 U.S.C. § 3162(a)(1)

18 U.S.C. § 3162(a)(2)

Jurisdiction and Venue

18 U.S.C. § 3231

18 U.S.C. § 3237

18 U.S.C. § 3238

28 U.S.C. § 631, *et seq.*Sentencing Guidelines

USSG §2B1.1(b)(1)(E), (H), (I)

USSG §2B1.1(b)(2)(C)

USSG §3B1.1

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

On December 18, 2009, appellant, Morris B. Fahnbulleh, and two other Liberian citizens¹ were charged by indictment with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371; one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1349; four counts of mail fraud, in violation of 18 U.S.C. § 1341; two counts of wire fraud, in violation of 18

¹ The indictment charged two additional individuals: (1) Thomas M. Parker, who to date, remains at large; and (2) Joe O. Bondo, who was tried together with appellant in the district court, and whose appeal is consolidated here. See *United States v. Joe O. Bondo*, U.S.C.A. Case No. 11-3047. Two additional counts of the indictment charged Mr. Bondo only, with witness tampering.

U.S.C. § 1343; and four counts of submitting false claims, in violation of 18 U.S.C, § 287 (App. 48).²

Testimony in the trial before the Honorable Reggie B. Walton and a jury commenced on October 20, 2010, and continued until the case was submitted to the jury, on November 10, 2010. On November 16, 2010, the jury found the defendant guilty on counts 1-8, and 11-14.

On April 26, 2011, Judge Walton sentenced the defendant to a total of 142 months' imprisonment: 142 months on Count 2; and 60 months on each of Counts 1, 3-6, 7-8, and 11-14, all to run concurrently. The court also imposed a three-year term of supervised release on each count (all to be served concurrently) and ordered the defendant to pay a \$1200 special assessment and restitution totaling \$1.2 million (App. 64-70).

Appellant noted his appeal on May 10, 2011 (App. 71).

THE TRIAL

In 2005, the United States Agency for International Development ("USAID"), provided a grant of \$1.9 million to

² "App" refers to the appendix submitted with this brief. With respect to the transcripts of the proceedings, we note that, some intervening trial transcripts were not included in the continuous pagination of the trial; therefore, transcripts will be identified by the continuous pagination of the trial ("Tr."), unless otherwise noted by specific date.

Catholic Relief Services ("CRS"), for the purpose of extending humanitarian assistance to the citizens of the West African nation of Liberia, a country ravaged by civil war (Tr. 82, 143, 387, 550). Although CRS accepts grants from the United States, it does not actually provide the assistance; instead, it gives to "consortium partners," throughout the world, who perform the disbursement of food and the other commodities needed by the recipient countries (Tr. 81).

In this case, CRS issued a \$1.24 million subgrant to World Vision (Tr. 387), a Christian organization with loosely affiliated chapters, including World Vision USA ("WV-USA") a company that lobbies the U.S. government, soliciting grant money and entering into contracts that, with respect to foreign countries, it then assigns to World Vision International ("WV-Int'l"), which in turn transfers responsibility to small local chapters, such as World Vision Liberia ("WV-Liberia") (Tr. 165, 282, 304). WV-Liberia is independent, but it can seek administrative support services, at times, from WV-Int'l (located in Monrovia, California) (Tr. 243), and WV-USA (located in the state of Washington).

Angelique Crumbly, USAID Director of Policy, Budget and Performance, testified that on March 9, 2005, the USAID

granted \$1.9 million to CRS, calling the project the Community Infrastructure Rehabilitation Project ("CRRP") (Tr. 550). The award period commenced January 25, 2005 (Tr. 550), and according to Crumbly, expenses incurred prior to that date would not be reimbursed (Tr. 547-48, 566). Only CRS (not World Vision) was responsible to submit the claims, on Standard Form (SF) 269, and any supporting documentation (Tr. 556, 562).

Lisa Mondori, an attorney with WV-Int'l, testified WV-Liberia was not in privity with USAID, and had no reporting requirements to USAID (Tr. 352-53). WV-Liberia had a system that tracked the distribution of food and other commodities that it used for all of its grants (*id.*). Information from these records was entered into what was called the Commodities Tracking System ("CTS"), and was used here, to generate reports to CRS.³

Eric Fullilove, Acting Chief Financial Officer of WV-Int'l, which is located in California, was asked to

³ Mondori was not an employee of WV-Liberia; nevertheless, she was allowed to present personnel records that she claimed reflected appellant's positions with WV-Liberia, during the period of his employment from January 2005 to December 2006 (Tr. 350, 367); and that co-defendant Bondo was a food monitor and commodities officer (*id.* at 351). She was not asked about defendant Parker, but employees later testified that he reported to appellant (Tr. 1050, had an office near appellant's (Tr. 807), and also worked as a field supervisor, alongside Bondo (*id.* at 581).

authenticate and describe the CTS documents that he said were retrieved from storage in Liberia, after WV-Liberia shut down (Tr. 241-43, 253-65). Using these records, the government presented the testimony of five former employees of WV-Liberia, many of whom testified that they falsified some of the records (Tr. 731, 815, 1031, 1077, 1328-29),⁴ and committed other wrongdoing, including: 1) the diversion of construction materials to the personal residences of Parker and Bondo (Tr. 697), and property that others claimed belonged to appellant; 2) the use of working hours for repairs and construction at those personal residences (Tr. 697); and 3) the repair of existing wells and latrine structures with limited construction materials, while reports were generated of new wells and latrines, using more abundant time and materials (Tr. 594).

Not one former employee testified (or ever told the principal government investigator (Tr. 1787)), that appellant directed them to create records, divert

⁴ The former employees testified that Bondo directed them to invent the names of food recipients, and to use all of their fingers to simulate their fingerprints (see, e.g., Tr. 1035, 1326). An FBI fingerprint expert testified that three documents bore fingerprints that matched the known prints of defendant Bondo (Tr. 1734). The expert did not provide any evidence that would have even tended to corroborate the claims of the former employees that they used five fingers to simulate the fingerprints of food recipients -- an allegation the government repeatedly stressed but apparently made no effort to corroborate.

materials, or perform any construction at his property. Appellant's only connection to the records was that he twice told employees that they should be "careful" not to get caught by auditors (Tr. 1046-47, 1080), and the location of their work table, which was down the hall from the door to appellant's office (Tr. 1078-79, 1332-36).

The defendants did not testify. Appellant presented the testimony of two neighbors (father and son), to establish that the son (not WV employees) dug the well outside appellant's home (Tr. 1696, 1705). Through cross-examination and with the testimony of a co-worker, appellant tried to show the government's evidence, if anything, pertained to an earlier contract with CRS, and not the CRRP, as charged in the indictment (see, e.g., Tr. 601, 784, 1402, 1575).

SUMMARY OF THE ARGUMENT

The defendant was denied a speedy trial because he was held in custody for 155 days before an indictment was returned (including an extended delay of 28 days, before his initial transfer from New York). The government claimed that it was awaiting foreign documents, but the time granted by the magistrate (who was without authority to extend the time for indictment), in any event, had run,

and the government (1) had not filed a motion to further extend the time; (2) did not explain why it could not proceed with evidence it already had obtained from foreign authorities; and (3) did not demonstrate that exclusion of this time from the calculation specified in the Speedy Trial Act would be "in the interest of justice [or] outweighs the best interests of the defendant and the public in a speedy trial." The magistrate judge properly dismissed the charges prior to indictment; the trial court erred in reinstating the case, post-indictment.

The trial court lacked subject matter jurisdiction and venue because the defendant's company had no privity with the United States (the dispute was between two non-governmental entities), the events of the case took place in Liberia, and appellant had no contractual or sub-contractual agreement with the United States or any of its agencies. The layered financial transactions of funds that ultimately were intended to send U.S. foreign aid to Liberia, rendered the funds no longer U.S. property and had, at a minimum, changed and concealed the character of the funds such that no reasonable person could have any longer considered them U.S. property. Appellant reasonably could and did believe that the food and commodities his

company had disbursed were donated by Catholic Relief Services.

The trial court improperly admitted documents the government proffered as business records, because no witness properly authenticated them or demonstrated reliability. The evidence of conspiracy was insufficient because was no evidence of agreement; moreover, intent to defraud the United States was not proven, because the property in question was not U.S. property, and no one could have anticipated or intended that the U.S. mails or wire communications would be used.

The trial court erred at sentencing: (1) in applying a 16-level enhancement for "loss" under U.S.S.G. §2B1.1(b)(1)(I), because appellant did not concede this amount, the jury did not find any diversion of funds or resources, and the total amount of U.S. foreign aid to Liberia, which transferred through no less than three non-government independent organizations, all of which accepted overhead and commission, was a gross overstatement of loss alleged to be caused by the defendant's activities; (2) in applying a 6-level enhancement because the offense "involved 250 or more victims," under U.S.S.G. §2B1.1(b)(2)(C), because appellant did not concede this number, the government did not prove it, and the evidence

supporting the enhancement was unreliable; and (3) in applying a 4-level adjustment for "organizer or leader" based on appellant's position with his company, but not on any proven "role in the offense."

Appellant also respectfully requests to join in any arguments made by co-appellant Bondo that may reasonably also pertain to his appeal, as well.

ARGUMENT

I. Appellant was denied a speedy trial.

A. Procedural Background

The government filed an initial complaint and arrest warrant on May 18, 2009, pursuant to which appellant was arrested on July 15, 2009, in the Southern District of New York. He was not presented for an initial appearance in the District of Columbia for 27 days, appearing before the Magistrate Judge August 11, 2009.⁵

At the time of his initial appearance, the government requested excludable time under the Speedy Trial Act of 1974 (hereinafter referred to as the "Speedy Trial Act" or "STA"), 18 U.S.C. §§ 3161-3174, based on a request for

⁵ As set forth more fully, *infra*, the district court found only five days of this delay reasonable, holding the remaining 22 days to constitute inexcusable delay (Mem. Op. dated October 7, 2010, at 14 (Walton, J.) (hereafter "Walton Opinion:"); App. 97.

foreign evidence that, at the time of the appearance, had been outstanding for seven (7) months. See § 3161(h)(8). The magistrate judge denied the government's request for a full year extension, granting only until October 16, 2009, for the timely return of an indictment (8/14/09 Tr. 65-66).⁶

On October 15, 2009, the government filed a status report detailing the original date and manner of its international request for assistance, advising the court that no documents had been received (App. 107). It did not explain what additional evidence it was expecting or why an indictment could not proceed in anticipation of the additional materials (App. 107-08). Most significantly, it did *not* file a motion to extend the time, until *after* the time had expired (see 10/16/09 Tr. 14-15; Gov't Mot. to Exclude Certain Time from STA Calculation, filed October 19, 2006, App. 105-09).

The magistrate judge, while conceding that "the determination of what evidence will be presented to a grand jury is entirely a matter of prosecutorial discretion and not reviewable" by her, nevertheless concluded:

[I]n the absence of representations -
ex parte or otherwise - regarding the

⁶ Appellant does not concede that Magistrate Kay had the authority, under the Federal Magistrates Act, 28 U.S.C. §631, et seq. (2000 ed. and Supp. V), to grant any extension of time, under STA.

need for the evidence now in the Republic of Liberia, the [court] has no means by which to make a finding that the proposed exclusion of time in which an indictment must be filed is in the interest of justice, and outweighs the best interests of the Defendant and the public in a speedy trial.

Mem. Opinion dated December 16, 2009, at 11, n.8 (Robinson, M.J.) (hereafter "Robinson Opinion"); App. at 72, 82.

Reviewing *de novo* the defendant's objections to the pre-indictment delay, the district court was satisfied that 129 days could be excluded under §3161(h)(8) -- the entire time period beginning on the date of the defendant's first appearance in the District of Columbia up to and including the date of indictment -- merely upon finding that the government had submitted an official international request for records; that the records "unquestionably would be located in Liberia;" and that officials in Liberia were working on a response. See Walton Opinion at 20; App. At 103. No examination was made of whether that enormous delay was "in the interest of justice and would outweigh the best interests of the defendant and the public in a speedy trial." See 18 U.S.C. §3161(h)(7)(A); *Zedner v. United States*, 547 U.S. 489, 501 (2006). No examination was made of the evidence already in the government's possession. No examination was made into whether the

extreme length of the delay was necessary. No examination was made of the prejudice to the defendant.

In addition, appellant complains that following his conviction, he was further denied due process, when the district court failed to produce trial transcripts for over a year from the filing of his notice of appeal.

B. Standard of Review

Review of a district court's legal determinations under the Speedy Trial Act is made *de novo*. *United States v. Hemphill*, 514 F.3d 1350, 1356 (D.C. Cir. 2008), *citing* *United States v. Fonseca*, 435 F.3d 369, 371 (D.C. Cir. 2006).

C. Legal Analysis

The Speedy Trial Act directs that an indictment "shall be filed within thirty days" from the date of arrest" 18 U.S.C. §3161(b). Although the STA sets forth circumstances for the exclusion of periods of delay, as set forth below, the sanction for violation of the 30-day limit is that the "charge against that individual contained in [the] complaint shall be dismissed or otherwise dropped" 18 U.S.C. §3162(a)(1) (emphasis added), and the government is barred from filing an indictment charging the defendant with the same crimes that had been alleged in the criminal

complaint. See *United States v. Bowman*, 496 F.3d 685, 688 (D.C. Cir. 2007).⁷

Here, the only pertinent circumstances under which the pre-indictment time period could have been extended is set forth in §3161(h)(8):

Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request ... has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

See 18 U.S.C. §3161(h)(8).⁸ Thus, a court can grant delay not to exceed one year, but certainly may grant less, as it did here, where the magistrate granted time only through October 16, 2009, despite the government's request for the full one-year. See 8/14/09 Tr. 65-66.

⁷ The rules are to be strictly applied: for example, the STA provides that trial shall commence within 70 days of indictment (see § 3161(c)(1)), a rule that is violated when, without a trial, 'dawn breaks on the [next] day' after the Speedy Trial period ends." *United States v. Hemphill*, 514 F.3d at 1356, quoting *United States v. Taylor*, 497 F.3d 676, 677 n.4 (D.C. Cir. 2007).

⁸ Also pertinent here, but not specifically in contention because of the trial court's ruling in appellant's favor, is §3161(h)(1)(F), which excludes "delay resulting from transportation of any defendant from another district," which in this case inexplicably consumed 27 days, only ten of which the statute presumes reasonable, and only five of which the district court, here, found reasonable and excludable. See Walton Opinion at 14; App. 97.

Having made no effort to examine the length of time justified in these particular circumstances, the district court appears to have presumed that any length of time up to a year is permissible. But the statute does not grant a one-year extension, it grants an extension "*not to exceed one year*," suggesting that judgment must be applied to the individual circumstances, to determine that which is reasonable and which balances the competing public interests. Here, the magistrate considering the government's original request granted until October 16, 2009. Indeed, by that time, as the government conceded in its status report dated October 15, 2009, its request to Liberia had been outstanding for ten months, and some documents had been received. It was perfectly reasonable for the reviewing magistrate to require a factual basis for further extension, sufficient to apply the balancing test contemplated by the Speedy Trial Act.

In contrast, the district court undertook no such review. Under the district court's analysis, it appears that any length of time, so long as it does not exceed one year, requires no further examination, once it is satisfied that an international request exists. Surely this is insufficient: it not only then hands over full discretion of diligence to the government, far worse than that -- it

shifts that burden of diligence to foreign bureaucrats, in distant countries, who have no reason to appreciate, respect or honor the rights and of detained individuals awaiting justice in U.S. courts. The logic applied by the district court permits the government to file a foreign request, arrest an individual upon probable cause, and hold him for up to a year before indictment, even where sufficient essential evidence has been received.

In contrast, the magistrate judge requested that the government demonstrate why the evidence set forth in the affidavit in support of the arrest warrant, combined with evidence already received from Liberia, could not have formed the basis for indictment -- not so that she could direct the progress of the prosecution, but rather, so that she could determine whether "exclusion [of additional time] would be in the interest of justice and would outweigh the best interests of the Defendant and the public in a speedy trial" (Robinson Opinion at 10; App. 81).

Pre-indictment dismissal, here, where on the date of the indictment, the defendant remained in custody for over five months and the government's foreign request had been outstanding for over eleven months, should have been with prejudice.

In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the STA] and on the administration of justice.

18 U.S.C. §3162(a)(2). Although a disturbing fraud case, perhaps, this case is not "serious" in a manner that suggests ongoing danger to the community. The alleged activities -- none of which involved violence or physical harm to any individual (see, e.g., *United States v. Osunde*, 638 F. Supp 171 (N.D. Cal. 1986)) -- were long since concluded. What harms may have occurred also had been remedied by the large companies involved in the dispute, so the government could not claim that dismissal would impact the administration of justice; the institutional participants had provided restitution and were pursuing various other civil, criminal, and administrative remedies against others.

On the other hand, appellant suffered precisely the harm and prejudice that the STA is designed to avoid: the government delayed his transfer from New York for a month, completely without explanation or justification, during which time he had no communication with his trial counsel

or potential witnesses, so that he could begin to prepare his defense and, as the defendant advised the court (in his pre-trial *pro se* motion to dismiss the indictment), he suffered the loss of employment and financial resources; inability to contact counsel and potential witnesses; fading memories and the loss of exculpatory evidence; and the anxiety, physical illness and humiliation associated with prolonged detention. See Defendant's *Pro Se* Motion to Dismiss Indictment with Prejudice for Speedy Trial Act Violation at 29, Docket Entry #110; App. 115. The balance of this prejudice against the government's alleged need to await additional foreign evidence was not considered or addressed by the district court.

The delay was exacerbated, when appellant waited a year from the filing of his notice of appeal, until receipt of trial transcripts. See *United States v. Johnson*, 732 F.2d 379, 383 (4th Cir. 1984) (two-year delay in producing trial transcript), citing *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980) (same).⁹ *Johnson* and *Rheuark* each hold that a delay in producing trial transcripts for appeal may be a denial of due process, depending on four factors:

⁹ See also *Layne v. Gunter*, 559 F.2d 850, 851 (1st Cir. 1977) (three-year delay); *Smith v. Kansas*, 356 F.2d 654, 657 (10th Cir. 1966) (one-year delay).

“‘[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.’” See *Johnson*, 732 F.2d at 382; *Rheuark*, 628 F.2d at 303; both quoting *Barker v. Wingo*, 407 U.S. 514 (1972).

With respect to appellate delay, *Rheuark* identified three specific concerns:

(1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person’s grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired. ... [P]rejudice to a defendant is clearly present when, after a substantial delay in awaiting an appeal, his conviction is reversed and the state is allowed to retry him, since during the delay witnesses or other evidence may no longer be available.

Rheuark v. Shaw, *supra*, 628 F.2d at 303, n.8.

Prejudice is significant, here, given appellant’s continuous custody of nearly three years: 27 days from arrest to initial appearance, 155 days from arrest to indictment, and nearly a year before appellate counsel could even begin to review the trial transcripts. The indictment alleges a conspiracy dating back to April 2005 (more than seven years ago) and events on another

continent. Were this case to be re-tried, it would be nearly impossible to reconstruct a defense after a period of time that would by then be significantly longer than seven years. The *Rheuark* court observed that, "a consideration of the Sixth Amendment speedy trial right in its most pristine sense would be triggered by any retrial of such a person." *Id.*

Taking into consideration the repeated delay in appellant's prosecution, and the near impossibility of fairness in any retrial, appellant requests more than mere reversal of this conviction, appellant believes that the interests of justice require dismissal with prejudice.

II. The district court lacked subject matter jurisdiction and venue /

A. Procedural Background

Pre-trial, appellant requested and was granted leave to represent himself *pro se*, and he moved orally and in writing for dismissal, for lack of venue and subject matter jurisdiction. By Order dated October 6, 2010 (see App. 120-23), the trial court denied the motion:

Section 3231 plainly states that this Court "shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States," and here, the crimes alleged in the indictment are indeed "offenses against

the laws of the United States" that purportedly took place, at least in part, within the territory of the United States.

Order dated October 6, 2010, at 2; App. 121. The specific allegations cited by the trial court all pertain to overt acts of the conspiracy involving communications between CRS and USAID and claims transmitted from CRS employees in Maryland to USAID offices in Washington, D.C. No co-conspirator or employee of WV-Liberia ever performed an activity of any kind in the United States.

With respect to venue, the trial court held that the indictment alleged sufficient venue, holding that "[v]enue is proper on the conspiracy counts ... because the indictment charges the defendant, *inter alia*, with committing overt acts within the District of Columbia," *id.* at 3; App. 122. Also, it held that venue was "proper for the mail and wire fraud counts because the grand jury alleges that the defendant 'knowingly caused to be delivered in the United States Postal Service ... false and fictitious reports ... to [USAID in] Washington, D.C.'" *Id.* The court declined to give a jury instruction on venue, holding:

[T]here's nothing from the face of the indictment that raises an issue regarding venue. And there's nothing that's been presented during this trial either through cross-examination during the government's case or through the

presentation of the defense case that raises ... a genuine issue, of dispute about the issue of venue. So it's my reading of [*United States v. Perez*, 280 F.3d 329, 334 (3d Cir. 2002)] that absent that showing there is no entitlement to a venue instruction.

(Tr. 1970). The court did not address venue with respect to the substantive charges of false claims, mail fraud, or wire fraud.

B. Standard of Review

This court reviews *de novo* a district court's ruling on subject matter jurisdiction. See *Piersall v. Winter*, 435 F.3d 319 (D.C. Cir. 2006). In cases where venue and sufficiency of the evidence are indistinguishable issues, the court reviews the evidence in the light most favorable to the Government, to determine whether the government has proven venue by a preponderance of evidence. See *United States v. Haire*, 371 F.3d 833, 837 (D.C. Cir. 2004), citing *United States v. Lam Kwong-Wah*, 924 F.2d 298, 301 (D.C. Cir. 1991).

C. Legal Analysis

1. Subject matter jurisdiction

Appellant worked for a Liberian company that accepted donations from various charitable organizations in the United States and elsewhere (Tr. 350, 367). The funds it

received for the program it called "CRRP" were funds provided and disbursed -- not by the United States -- but by CRS, a non-governmental organization with offices and employees resident in Liberia. It is undisputed that WV-Liberia had no privity with the United States (Tr. 352-53) and also, that both CRS and USAID had auditors and inspectors in Liberia who were responsible for contract compliance (Tr. 983, 1594). If WV-Liberia employees committed a crime -- and appellant does not concede they did -- it was against CRS, *not* against the United States. Of course, disputes between private companies, most particularly those committed overseas, do not provide a basis for subject matter jurisdiction, even where fraud is alleged. See 18 U.S.C. § 3231.

The United States (USAID) cannot claim that it was targeted here, where it purposefully constructed the legal separation of responsibility for this program. It presumably garners a legal benefit from this relinquishment of responsibility for food distribution to CRS, and from CRS to international companies, and from those companies to their distant local partners, the practical result of which is a business structure that separates the United States from funds and commodities that previously were its

property.¹⁰ Moreover, the absence of privity with the United States, coupled with CRS acceptance of responsibility for contract oversight and its own contract compliance, suggests that the Liberian employees of a Liberian company, who never leave Liberia and who never communicate with U.S. government employees or agencies, are not committing, contemplating or intending to commit crimes against the United States, much less conspiring or scheming to do so. Moreover, they could not believe that activities that satisfy obligations to CRS (acts performed entirely in Liberia, subject to CRS oversight in Liberia), could use or "cause" the use of U.S. mail or wire facilities.

2. Venue

The district court ruled that venue was proper because the defendants caused others to act within the District of Columbia, even though not one co-conspirator ever stepped foot here. Pursuant to 18 U.S.C. §3237:

[A]ny offense against the United States
begun in one district and completed in

¹⁰ The layering of responsibility for the project makes all the more outrageous the government's remarks, in closing argument, that WV-Liberia employees -- layers further and further into the process -- were "U.S.-salaried employees" (11/9 Tr. 81, 86). More than mere oratory, this plain falsehood could only have been intended to inflame the jury, much like the government's improper references to the loss of "taxpayer dollars" (11/9 Tr. 111) that prompted a curative instruction (11/10 Tr. 114).

another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

18 U.S.C. 3237(a). Here, any acts committed in the District of Columbia were *not* committed by co-conspirators, but could only constitute innocent acts of U.S. government employees, paying claims submitted by CRS. *Id.*

The trial court's analysis more properly should have considered 18 U.S.C. §3238, which states that:

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment, or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

18 U.S.C. §3238. This is not the analysis that the trial court applied here, which also would not have permitted venue in D.C., because appellant was arrested in the Southern District of New York and his co-defendant was arrested in the District of Maryland (Tr. 1005).

Appellant requested in a timely manner, several times, that the trial court instruct the jury of its obligation to find, specifically, that the government had proven venue (10/26 Tr. 9; 11/4 Tr. 1845). The trial court admitted that it mistakenly only considered the issue of a venue instruction in relation to the conspiracy charge (11/10 Tr. 174), but even with respect to the conspiracy charge, venue was insufficient. Any acts committed in the United States were innocent requests or completion of payments, and although an overt act can be innocent (*Iannelli v. United States*, 420 U.S. 770, 785 (1975)), it still must be committed by a co-conspirator (*United States v. Lam Kwong-Wah*, 924 F.2d 298, 301 (D.C. Cir. 1991)).

The statute ... explicitly provides that for the crime of conspiracy to be complete, one or more of the co-conspirators must have performed an overt act to bring about the object of the conspiracy. This language cannot be stretched to include the posting of a letter by a non-conspirator.

United States v. Manges, 110 F.3d 1162, 1170 (5th Cir. 1997) (act of a non-conspirator could not constitute an overt act and therefore could not extend the statute of limitation).

But the even more serious defect concerns the substantive charges, because venue was clearly lacking with

respect the false claims, mail fraud and wire fraud charges contained in Counts 11 through 14. With respect to non-conspiracy offenses, this court requires more direct intention to enter a venue:

If the government wishes to establish venue for an ... in a district where the defendant did nothing, but where the defendant's confederates committed criminal acts, it is required to argue and prove that the defendant specifically aided and abetted those acts and to request that the jury be instructed on the issue. Because the government failed to advance any such argument or proof or to obtain a proper jury instruction, we reverse [the conviction].

United States v. Lam Kwong-Wah, 924 F.2d at 302 (attempted drug distribution). The government did not request, here, and the court did not give, an aiding and abetting instruction, here, charging only that the defendant "knowingly caused" a claim to be made (11/10 Tr. 161), and then, further confusing the issue of venue (particularly where no co-conspirator ever left the territorial boundaries of Liberia) with the recitation of a "Pinkerton" instruction,¹¹ immediately following the elements of false claims:

As I indicated earlier, a conspiracy is a kind of partnership in crime and its members may be responsible for each

¹¹ See *Pinkerton v. United States*, 328 U.S. 640 (1946).

others' actions. A defendant is responsible for an offense committed by another member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, and a natural consequence of, the conspiracy.

11/10 Tr. 163. *Pinkerton* liability and accomplice liability differ significantly because, among other things, aiding and abetting requires proof that the defendant "intentionally participated" in the principal's crime:

The rule of [*Pinkerton*] does service where the conspiracy was one to commit offenses of the character described in the substantive counts. Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy. And if a conspiracy is also charged, it makes no difference so far as aiding and abetting is concerned whether the substantive offense is done pursuant to the conspiracy. *Pinkerton* ... is narrow in its scope. Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing.

Nye & Nissen v. United States, 336 U.S. 613, 620 (1949), citing *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938).

But with respect to venue, the government cannot rely on a *Pinkerton* theory; rather, the jury must find that the defendant consciously shared in the specific criminal act. The defendant was entitled, therefore, even if only with respect to the substantive charges to a jury instruction on

venue. This court has held that "where there is no facially-obvious defect in the allegations of venue," the trial court must specifically instruct the jury on venue, where three conditions are met:

"(1) the defendant objects to venue prior to or at the close of the prosecution's case-in-chief; (2) there is a genuine issue of material fact with regard to proper venue, and (3) the defendant timely requests a jury instruction."

United States v. Haire, 371 F.3d at 840, quoting *United States v. Perez*, 280 F.3d 329, 334 (3d Cir. 2002). These conditions were met, here: it is beyond cavil that this defendant, when he was arguing on his own behalf *pro se* and through counsel, strenuously did (and continues to) object to venue; moreover, the trial judge stated no basis for venue, throughout the proceedings below, other than appellant caused others to commit acts in the District of Columbia; and finally, appellant did indeed request a jury instruction (10/26 Tr. 9). Appellant asserts, therefore, that the trial court's refusal to dismiss the indictment for lack of venue was error, and its refusal to include an instruction on venue was error.

III. The evidence was insufficient

A. Procedural Background

The record is replete with testimony that Parker and Bondo instructed employees to falsify records and to perform construction labor at their personal residences during working hours;¹² however, with respect to appellant, a most generous summary of the evidence is no more than:

(1) that a table occupied by employees when they were creating false records was down the hall from his office (Tr. 1078-79, 1332, 1336);

(2) that he *never* directed employees to falsify records (Tr. 1787); but he told them to be careful not to be seen (Tr. 1046-47, 1080, 1330);

(3) that he once told an employee "the others are helping me; why aren't you?" with no particular reference to what "helping" meant or whether it was

¹² We note that even with respect to Messrs. Parker and Bondo, let alone with respect to appellant, there is not one word of testimony about food commodities being diverted, or demonstrating that the alleged co-conspirators did anything other than create documents with fictional, rather than the real recipients of food distribution. It certainly is not unimaginable that individuals unschooled in the niceties of Western civilization business methods, might perform first and do the paperwork later. Indeed, while the jury found that records had been falsely created, it expressly did not find that conspirators had diverted food and construction materials, declining to find that the defendants had committed overt acts (a) (the diversion of food "to be sold for cash at local markets"); (b) (the division of the proceeds of such sales), or (c) (the diversion of construction materials purchased for the CRRP) (App. 55-56, 129). Another explanation, to which government witnesses admitted, was that commodities were sometimes stolen by people "in the community" (Tr. 824).

work-related (Tr. 1523), and that he may have asked him to dig a well (Tr. 1528);

(4) that an employee got sand at a beach and took it to appellant's house (Tr. 1343, 1413);

(5) that he told an employee that if he told auditors that he had repaired old wells, rather than digging new ones, he might lose his job (Tr. 1500, 1502); and

(6) that an employee claimed to have dug a well on appellant's property (Tr. 1602), (but defense witnesses claimed it was a neighbor who dug the well (Tr. 1696), and that it was a public well (Tr. 1705)).

This is the quantum of evidence against appellant, other than the testimony of the investigating agent, that she "assumed" appellant was part of the wrongdoing, simply based on his position in the company (Tr. 1790).

Ruling on appellant's motions for judgment of acquittal (MJOA),¹³ the trial court held:

You've got witnesses who say that [appellant] was saying things to them that clearly indicated that he appreciated what they were doing and told them that they should do it discretely so it would not be detected. I think, by inference, circumstantially that is clearly sufficient evidence to show that he was a part of this overall scheme to falsify this information in order to pilferage it for his own purposes and those of other members of the conspiracy.

* * *

¹³ Due to logistical issues relating to the presentation of defense testimony remotely, from the U.S. Embassy in Liberia, the Court agreed to hear all of the defendants' MJOAs at the conclusion of all of the evidence.

I think the evidence is sufficient circumstantially to indicate that [appellant] was, in fact, a part of a conspiracy. I think there clearly is evidence that there was a concerted effort taking place within World Vision Liberia to falsify information regarding commodities and also information related to other activity of employees of World Vision who were supposed to be providing services and products to people in need in the country, and that rather than that occurring, those items were being, in some way, used for the benefit of [appellant]. Admittedly, there is no specific evidence in the record showing that money was in some way ending up in his possession as a result of the products not going to who they were supposed to go. But I think, again, by inference, one could infer that ... there was a benefit he was acquiring ... based upon the fact that purportedly employees who were supposed to be doing work for the people of Liberia were doing it ... for the personal benefit of [appellant], so I think the evidence circumstantially is sufficient to support all the claims that have been filed against him in the indictment.

(11/9 Tr. 49, 51-52; App. 124-32).

B. Standard of Review

Reviewing the sufficiency of evidence, this court reviews the evidence *de novo*, in the light most favorable to the government, *United States v. (Cory) Moore*, 97 F.3d 561, 563-64 (D.C. Cir. 1996), *citing United States v. Lucas*, 67 F.3d 956, 959 (D.C. Cir. 1995), drawing no

distinction between direct and circumstantial evidence, *id.*, citing *United States v. Teffera*, 985 F.2d 1082, 1085 (D.C. Cir. 1993).

C. Legal Analysis

The corpus of the government's evidence were "36 binders" of documents that the government claimed were WV-Liberia business records, offered through the testimony of a "summary witness," Eric Fullilove, the Acting Chief Financial Officer of WV-Int'l, located in California (Tr. 241-43, 266). Fullilove had no personal familiarity with the documents, given that he didn't work at World Vision until after the CRRP project was completed; he reviewed but did not conduct the audit of the records; he did not ever review the individual documents "summarized" in the audit report; indeed, he had never even been to Liberia (Tr. 277-79, 290-92, 323). Over numerous foundation objections by both defendants, the trial court admitted records claimed to be from WV-Liberia's "commodities tracking system" (Tr. 253-65), even though the entirety of the foundation was Fullilove's conclusory statement that they were "maintained by World Vision in the ordinary course of business" (Tr. 255); in a branch office in which the witness did not work (Tr. 265), "prepared by World Vision employees ... who had to

complete [them] as part of their job responsibilities" (Tr. 260), in a "time frame" he did not "precisely" know (Tr. 261-62). There was no additional foundation elicited about whether the records were created contemporaneously with the business activity; whether the employees had a duty to be honest; whether there was any integrity to (or knowledge of) the records' storage and maintenance; whether there was knowledge of the circumstances of their retrieval;¹⁴ and whether the retrieval was comprehensive (Tr. 254-65). In short, the government did not demonstrate authenticity or trustworthiness in these papers.

Under Federal Rule of Evidence (FRE) 803(6), a business record must be (A) made at or near the time the information is transmitted, (B) by a person with knowledge and (C) a duty to be truthful, (D) kept and stored in the course of regularly conducted business activity, (E) as a regular practice of the business, (F) with a circumstantial guarantee of trustworthiness. FRE 803(6); see also 18 U.S.C. § 3505; E.J. Imwinkelried, *Evidentiary Foundations* (2d Ed.) 262 (1989). The government did no more than ask for the ultimate conclusion from its witness, perhaps

¹⁴ Specifically, Fullilove testified that "[i]t wasn't part of the [audit] report or the work papers who exactly gave us the records" (Tr. 294).

because the witness (a CFO from a different company, located continents away from where the records were made) *did not have* the knowledge necessary to lay this foundation.

There is no indication, in this record, whether *all* of the records created for the CRRP program were produced, or which records (produced or missing) are the records that were relied upon by CRS, or were submitted or maintained for their review, if any. Not a single witness testified that CRS or USAID relied upon these particular records for any purpose -- at best, a witness may have said that a form or category of records was created for potential review, but the court should not have allowed the government to drop a massive load of papers without even the slightest idea that these specific records were the ones set aside for that purpose (even if only circumstantially, based on location and maintenance), and that no other records existed elsewhere (because the witness knew of a reliable method of retrieval to ensure that production was complete). No such foundation was elicited, here.

Late in the trial, the court denied that anything had been admitted as a business record, believing that it had accepted the records because they were *false* (Tr. 1776-78). The court refused to allow the defense to introduce a

derivative record that indisputably *had been submitted* to CRS for its reliance (Tr. 1778-79), stating that with respect to WV-Liberia documents it could not make "the threshold determination of trustworthiness ... without something more having been presented ... that would justify the jury considering the document for the truth of the information contained therein" (11/9 Tr. 21).

I don't know if you're ever going to be able to satisfy me that narrative information in a report prepared by World Vision Liberia has a sufficient level of trustworthiness, that it's going to come in as a business record or as an exception under the residual hearsay examination.

(Tr. 1950). But the government had been permitted to publish the entire mass of unreliable documents, telling the jury they were "business records" (Tr. 255, 260).

Furthermore, the government did not prove that appellant directed the falsification of the documents. At worst, the evidence supported only allegations that he was aware that others in the company were creating false documents, cautioned them to be careful, and did nothing to report the crime to authorities. This falls far short of elements of conspiracy.

To prove conspiracy under 18 U.S.C. § 371, the government must prove "that the defendant entered into an

agreement with at least one other person to commit a specific offense ... as well as that the defendant knowingly participated in the conspiracy with the intent to commit the offense and that at least one overt act was committed in furtherance of the conspiracy." *United States v. Gatling*, 96 F.3d 1511, 1518 (D.C. Cir. 1996). While the government need only prove that the conspirators agreed to "the essential nature of the plan" and not "the details," and may do so with inferences from circumstantial evidence, *id.*, the government must still show that an agreement was formed, and that it "had as its objective a violation of the law." *United States v. Lam Kwong-Wah*, 924 F.2d at 303.

Here, there is no evidence of agreement or of an objective to violate the law. Mere knowledge that others were creating false documents near his office did not demonstrate that appellant agreed to commit a crime.¹⁵ There was no testimony of meetings, conversations, or appellant's actions in concert with others that would demonstrate conspiratorial agreement. "'While association with conspirators is evidence of participation in the

¹⁵ Nor is it enough that appellant might have known that work was done at his house, by employees of his company, particularly where the employees admitted that there were idle days (with no contract work to do), when they were free to perform personal projects (Tr. 869).

conspiracy, something more is needed to show beyond a reasonable doubt the deliberate, knowing, and specific intent of the defendant to join the conspiracy.'" *United States v. Childress*, 58 F.3d 693, 708 (D.C. Cir. 1995), quoting *United States v. Rengifo*, 858 F.2d 800, 808 (1st Cir. 1988), abrogated on other grounds by *Kentucky v. King*, 131 S. Ct. 1849 (2011).

Moreover, the government must show "purposeful intent -- or 'conscious desire to achieve [the] result'" of breaking the law. *United States v. Childress*, 58 F.3d at 707-08, quoting *United States v. Bailey*, 444 U.S. 394, 404 (1980). Here, the charged intent was "to commit and cause to be committed offenses against the United States [and] to defraud the United States" (App. 54), but the funds and commodities did not belong to the United States, and appellant had no relationship with or responsibility to the United States.

Appellant offers this analogy: as everyone knows, federal and state governments have Food Stamp programs intended to provide food for indigent American families. If a Maryland parent purchases food with Food Stamps, packs a lunch for her child, and sends her off to school, the bully who steals her lunch on the playground has not stolen from (or defrauded) Maryland or the United States, even if

he knows that the family uses Food Stamps, *i.e.*, that the food was bought with credits provided by the government. The victim is not the government; the victim is the child. And as we shall see in the next Section, *infra*, the measure of the resulting "loss" is not the family's annual food budget or the federal government's contribution to Maryland's Food Stamps program -- the measure of "loss" is the value of the sandwich.

**IV. The district court improperly calculated
defendant's advisory Guidelines range** /

A. Procedural Background

Under Guidelines §2B1.1, appellant's base offense level was 7, to which the district court added 26 levels based on two specific offense characteristics (16 levels under §2B1.1(b)(1)(I), for what it calculated as a \$1.2 million "loss," and 4 levels under §2B1.1(b)(2)(C), for 250 "victims") and one adjustment (4 levels under §3B1.2(a), for "role in the offense"), for an overall adjusted offense level 33, and a sentencing range of 135 to 168 months. Using this adjusted range, the court sentenced appellant to 142 months.

B. Standard of Review

This court reviews sentences under a "deferential abuse-of-discretion" standard, determining whether a sentence is "reasonable." *Gall v. United States*, 552 U.S. 38, 41 (2007).

C. Legal Analysis**1. The district court erred in applying USSG §2B1.1(b)(1)(I)**

Accepting the government's estimate of a "loss" amount of \$1.2 million, the court applied specific offense characteristic §2B1.1(b)(1)(I), resulting in a increase of 16 levels. Because this figure included the gross amount of funds donated to the CRRP program, and did not account for food and commodities actually delivered, and for the layers and layers of transfers and commissions taken by a vast array of independent entities, this figure was grossly inflated.

Although the original grant from USAID to CRS was \$1.9 million, the CRS subgrant to WV-USA (after CRS took a percentage for administration) was \$1.24 million (Tr. 387). WV-US took another 27% of the grant (Tr. 305), before assigning responsibility to WV-International (not WV-Liberia, which had no contract with or responsibility to

the CRS or any agency of the United States), which would bring WV-International's total responsibility to \$905,200.¹⁶ But the most significant concession made by the United States, prior to sentencing, was its representation to the trial court, contained in a letter (App. 255) that the court considered (4/26/11 Tr. 2), that the "258 towns received only 91 percent of the food that the defendants' program purportedly distributed to them." *Id.* Ninety-one percent performance suggests a loss of only \$81,468.¹⁷ Moreover, the jury's verdict did not establish a diversion of food: the verdict demonstrates that the only conduct unanimously found involved work done at personal residences and falsification of documents

The fact that the behemoth companies elected to settle their responsibilities to one another with contractually-mandated refund payments does not settle the issue of "loss" under the USSG. Here, the district court should have endeavored to calculate a more reasonable loss figure,

¹⁶ Loss between \$400,000 and \$1 million results in only a 14-level increase under USSG §2B1.1(b)(1)(H); therefore, correction for this specific characteristic alone, would lower appellant's range to 108 to 135 months.

¹⁷ Loss between \$70,000 and \$120,000 results in only an 8-level increase, under USSG §2B1.1(b)(1)(E); therefore, correction to reflect this loss figure alone, would lower appellant's range to 57-71 months.

that more fully reflected actual loss, this appellant's limited responsibility and, at a minimum, the government's concession that 91% of the food was distributed.

2. The district court erred in applying USSG §2B1.1(b)(2)(C)

Although not included in the original draft of the presentence report prepared by the Department of Probation, the district court accepted the government's invitation to enhance the defendant's sentence by six (6) levels, under §2B1.1(b)(2)(C), based in the government's argument that there were more than 250 "victims" (4/26/11 Tr. 33). Although the trial court properly evaluated a category of individuals who had suffered no "pecuniary loss," as required under the Guidelines,¹⁸ the ultimate application of this adjustment is completely unsupportable.

"Number of victims" was never submitted to the jury; indeed, other than a description of the program-design (Tr. 578), no percipient witness ever testified that an individual who provided labor was denied food. The government presented *at sentencing only* letters from

¹⁸ The trial court rejected the theory that any individual who could potentially have received food had a vested interest sufficient to render him a victim suffering loss (4/26/11 Tr. 31). It accepted the government's allegation, however, that individuals had provided labor for food, and had not received the food payment (*id.* at 33).

individuals worked and distributed food (4/26/11 Tr. 30) and three letters only, which contained references to "105 people," "120 persons," and "150 persons" who performed "roadside brushing" services and did not receive food payments (*id.* at 30-31).

As we noted in [*Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)]: "[T]he historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours. ... '"

United States v. Booker, 543 U.S. 220, 239 (2005) (emphasis in original; further internal citations omitted). None of the individuals whose unsworn letters the government presented, testified at trial; none of the witnesses who were presented at trial were asked about work performed without food distribution. The trial court should not have considered this allegation at sentencing, particularly where the effect on the USSG calculation was severe.¹⁹

¹⁹ Correction for this specific characteristic alone, would lower appellant's adjusted range to 70 to 87 months.

3. The district court erred in applying USSG §3B1.2(a)

The trial court applied a four (4) level increase for appellant's "role in the offense," under USSG § 3B1.2(a), finding that he was a leader or organizer, based on appellant's "position of hierarchy in this organization" and the fact that he was an "active participant in the fraudulent behavior that was being perpetrated" (4/26/11 Tr. 24-25). This, too, was unreasonable.

Although appellant may have had a managerial role in WV-Liberia, that does not mean he had a managerial role in the offenses. Indeed, the evidence is to the contrary. As set forth in Section III, above, it is clear that appellant played, if anything, a minor role in this offense, and in fact, he does not concede that he played any role, whatsoever. The alleged co-conspirators, Thomas Parker and Joe Bondo gave all of the direction to employees regarding documents and construction work. It was unreasonable for the trial court to conclude, merely based on appellant's position with WV-Liberia, that he was an "organizer of leader" of the fraudulent activity.²⁰

²⁰ Correction for this adjustment alone, would lower appellant's adjusted range to 87 to 108 months.

The combination of enhancements and adjustment applied in this case grossly inflated the trial court's calculation under the USSG by a total of eighteen levels, from a range of 18-24 months (an amount of time that, incidentally, he already has served) to a range of 135-168 months. Appellant believes that the calculation was unreasonable, and at a minimum, his case should be remanded for resentencing.

CONCLUSION

For all of the reasons set forth herein, appellant respectfully requests that his case be reversed and dismissed with prejudice, or, at a minimum, that it be remanded to the district court for re-sentencing.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for Appellant hereby certifies that this Brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this Brief, there are 11,273 words in this Brief.

_____/s/_____

BARBARA KITTAY
Counsel for Appellant
(Appointed by the Court)
D.C. Bar Number 414216
P.O. Box 2458
Kensington, Maryland 20891
(301) 468-1817
bkittay@verizon.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have filed the foregoing Brief for Appellant with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on July 23, 2012.

The following are registered CM/ECF users and will be served by the appellate CM/EC system: Elizabeth Trosman, Acting Chief, Appellate Division, U.S. Attorney's Office for the District of Columbia, counsel for appellee; and Sandra Roland, Assistant Federal Public Defender, counsel for the consolidated defendant, Joe Bondo, and will be provided with paper copies of the brief and appendix, by first class, U.S. Mail, this 23rd day of July, 2012.

_____/s/_____
Barbara E. Kittay